92-285

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE HONORABLE TONY LINDSAY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court order preventing a litigant in a civil case from publishing paid political speech in local newspapers on issues of national concern during the pendency of the trial, even though the speech in no way concerns the specific facts of that case, is an unconstitutional prior restraint in violation of the right of freedom of speech protected by the First and Fourteenth Amendments.

2. Whether a state supreme court's misapplication of its own procedural requirements in refusing to adjudicate a constitutional challenge under the First Amendment constitutes an independent and adequate state ground, precluding review of that challenge in this Court.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

All of the parties to the proceeding are listed in the caption. Additional parties to the proceedings in the Texas Court of Appeals are John Eddie Williams, the attorneys of the law firm of Umphrey, Burrow, Williams, and Bailey, and the attorneys of the law firm of Ness, Motley, Loadholt, Richardson, and Poole.

Petitioner Keene Corporation has one subsidiary: Reinhold Industries. Keene Corporation has no parent corporation.

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice And Associate Justices
Of The Supreme Court Of The United States:

Petitioner Keene Corporation (hereinafter "Petitioner") prays that a writ of certiorari issue to the Supreme Court of the State of Texas:

OPINIONS BELOW

The order, issued by Respondent against Petitioner, is set forth in the Appendix at p. 11. The unpublished opinion of the Fourteenth Court of Appeals of the State of Texas, declining to vacate Respondent's order and overruling Petitioner's motion for leave to file a petition for writ of mandamus, is set forth in the Appendix at pp. 12-13.

The order of the Texas Supreme Court, dismissing Petitioner's petition for writ of mandamus, is set forth in the Appendix at pp. 16-17. The order of the Texas Supreme Court, denying Petitioner's motion for rehearing, is set forth in the Appendix at pp. 39-40.

JURISDICTION

The decision of the Court of Appeals of the Fourteenth Supreme Judicial District of the State of Texas, declining to vacate Respondent's order, was entered on March 27, 1992, with an opinion filed on April 2, 1992. The order of the Texas Supreme Court, dismissing Petitioner's petition for writ of mandamus, was entered on April 15, 1992. The order of the Texas Supreme Court, denying Petitioner's motion for rehearing, was entered on May 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are U.S. Constitution, Amendment I and U.S. Constitution, Amendment XIV, Section 1, reproduced in the Appendix at p. 1.

STATEMENT OF THE CASE

Petitioner is a Delaware corporation with its principal place of business in New York.

Petitioner is a defendant in literally tens of thousands of asbestos products liability cases around the country. In Texas, Petitioner is a named defendant in more than four thousand of such cases, mostly in the Houston and Dallas areas. This litigation stems from Petitioner's purchase for just $8 million, in 1968, of Baldwin, Ehret-Hill

[BEH], a small manufacturer of ventilation systems, acoustical and thermal insulation products, some of which contained asbestos. Since that time, Petitioner has spent more than fifty times the purchase price of BEH, defending lawsuits based on asbestos related claims. To date, an estimated $9 billion has been spent by all defendants in this litigation, with nearly two-thirds, or $6 billion, on "transaction costs," mostly lawyers' fees. In reaction to these costs, Petitioner has taken a public position against the high cost of legal fees, punitive damages in asbestos cases, the filing of non-meritorious cases, and the legal system's general handling of the nationwide asbestos problem. It has also urged widespread political reform of that system.

Petitioner has undertaken a nationwide campaign of publication in an effort to influence the manner in which this country deals with the asbestos problem. In so doing, it has utilized various methods of communication, including letters to the editor, speeches, and opinion articles in newspapers. Examples are reproduced in the Appendix at pp. 54-69. A vital part of Petitioner's campaign has been the publication of advocacy advertisements in various papers around the country as a means of communicating its message to the American public. In these advertisements, Petitioner has urged wide-ranging legislative and executive reform of the method for dealing with the asbestos litigation crisis, on both the state and federal levels. At no point have Petitioner's advocacy advertisements commented on the facts, litigants or specific issues in a particular litigation to which Petitioner was a party. Examples of previously published advertisements appear in the Appendix at pp. 41-53.

The underlying case giving rise to this petition is a consolidated action involving twenty-two lawsuits alleg-

ing personal injury as a result of exposure to insulation products containing asbestos. Petitioner was one of the named defendants in these actions. These consolidated cases were tried in Harris County, Texas, beginning on March 16, 1992.

During pretrial hearings on March 12, 1992, counsel for the plaintiffs in these cases made an oral motion requesting that the trial judge, The Honorable Tony Lindsay of the 280th Judicial District Court of Harris County, Texas (hereinafter "Respondent"), enter an order prohibiting Petitioner from publishing any advertisements concerning asbestos in any newspaper published in Harris County, Texas. Apparently, plaintiff's counsel was responding to an advertisement which had appeared in the *Houston Chronicle* on March 5, 1992, that spoke out against the wastefulness of asbestos related litigation. A copy of that advertisement appears in the Appendix at pp. 43-44.

On March 16, 1992, Respondent entered an order, reproduced at page 2 in the Appendix, enjoining Petitioner from "plac[ing] advertisements regarding asbestos litigation in any newspaper published in Harris County, Texas until the verdict of the jury . . . is received by this Court." Respondent acted without hearing any testimony on the possible effect the order would have on Petitioner's constitutional rights or any discussion of a measure less invasive of Petitioner's free speech right than imposition of a prior restraint on Petitioner's speech.

On March 20, 1992, Petitioner filed a motion to reconsider, arguing that Respondent had available means of assuring a fair trial far less invasive of free speech rights than imposition of a prior restraint, such as admonishing the jury not to read or see anything concerning asbestos litigation or sequestering the jury. On March 24, 1992, following a hearing, Respondent withdrew her original

order and issued a second order enjoining Petitioner "from advertising regarding punitive damages and attorney's fees in reference to asbestos litigation in any newspaper published in Harris County, Texas until the verdict of the jury . . . is received by this Court." By its terms, this order was not confined in its restrictions to commentary by Petitioner concerning the specific facts, litigants or issues involved in the underlying litigation. The March 24 order appears in the Appendix at p. 11.

On March 26, 1992, Petitioner filed a motion for leave to file a petition for writ of mandamus and a petition for writ of prohibition in the Court of Appeals for the First Supreme Judicial District, Houston. Both motions were overruled by the Court of Appeals of the Fourteenth Supreme Judicial District on March 27 with opinions filed on April 2, 1992. These opinions are set forth in the Appendix at pp. 12-13 and 14-15.

Petitioner then filed a petition for writ of mandamus in the Texas Supreme Court. On April 15, 1992, the Texas Supreme Court dismissed the petition as moot, apparently because the underlying order of Respondent had expired at the end of trial. Petitioner moved for a rehearing, on the grounds that the case fell within state law's well established exception to mootness for cases that are capable of repetition yet will evade review. A copy of Petitioner's motion for rehearing appears in the Appendix at p. 18. Petitioner's motion for rehearing was denied on May 20, 1992. A copy of that denial appears in the Appendix at pp. 39-40.

Petitioner now petitions this Court for a writ of certiorari as the court of last resort to vindicate its constitutional right to speak on issues which are of great public concern and are the subject of widespread proposals for legislative reform.

REASONS FOR GRANTING THE PETITION

I.

THE INJUNCTION PREVENTING PETITIONER FROM EXERCISING ITS FREE SPEECH RIGHTS SERIOUSLY UNDERMINES SETTLED CONSTITUTIONAL PRINCIPLES AND IGNORES DECISIONS OF THIS COURT WHICH DEFINE THE PERMISSIBLE SCOPE OF INJUNCTIONS AGAINST EXPRESSION DURING LITIGATION

The injunction issued by Respondent against Petitioner represents the most invidious form of free speech regulation prohibited by the First and Fourteenth Amendments to the United States Constitution: a prior restraint of expression. This Court has long made clear that such inhibitions on speech are especially disfavored, because they stifle communication before anyone is able to measure either its wisdom or its danger. *Near v. Minnesota*, 283 U.S. 697 (1931). *See generally* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11 (1981). As this Court stated in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*):

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."

See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). "The damage can be particularly great," this Court has stated, when—as in this case—"the prior restraint falls upon the communication of news and commentary on current events." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, "the barriers to prior restraint remain high unless we are to abandon

what the [Supreme] Court has said for nearly a quarter of our national existence and implied through all of it." *Id.* at 561. Hence it is only in the most extreme situations, involving the gravest danger, that such a stifling form of regulation may be upheld.

Because gag orders such as the one issued by Respondent are classic prior restraints, this Court has long held that such orders are unconstitutional unless the expression that has been restrained is found to present a serious and imminent danger of disruption of the judicial process.[1] As this Court held in *Craig v. Harney*, 331 U.S. 367, 376 (1947), before expression may be prohibited "[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *See also Bridges v. California*, 314 U.S. 252, 263 (1941), holding that regulation

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[1] It should be emphasized that the mere fact that Petitioner's political expression would have come in the form of an advertisement does not render Petitioner's expression less protected "commercial speech." This Court has made clear that to qualify as "commercial speech" expression must propose a commercial transaction, which Petitioner's previous advertisements have not done. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). In fact, much classic political expression has come in the form of advertisements. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), where this Court held: "That [a newspaper is] paid for publishing [a political] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Cf. Keene Corp. v. Abate*, ___ Md. App. ___ (1992) (Appendix, pp. 75-76): "The paid advertisements placed by Keene . . . , like the paid advertisement in *New York Times v. Sullivan*, addressed a matter of public concern. . . . Although the message that asbestos litigation should be controlled clearly promotes Keene's economic interests, the advertisements in no way 'propose[d] a commercial transaction.' . . . In short, the advertisements simply cannot be viewed as commercial speech."

of out-of-court publications are to be governed by the clear-and-present-danger standard, described as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

This Court has held that judicially imposed gag orders, even in criminal trials and even when confined to statements about the specific parties to or facts of the case, are only rarely permissible. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). This is because there will invariably exist alternative means to avoid prejudicing the jury that are considerably less invasive of the First Amendment interests of both the parties to the case in communicating and the public at large in receiving information concerning matters of social or political importance. These include "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Id.* at 564.

This case presents a considerably weaker justification for the restriction of expression than did the fact situation in *Nebraska Press Ass'n*, where this Court in any event found the restraint unconstitutional. First, unlike *Nebraska Press Ass'n*, the present case is a civil adjudication, rendering the special constitutional protections available only to criminal defendants irrelevant. *See, e.g.*, U.S. Constitution, Amends. VI, VIII. Second, again unlike *Nebraska Press Ass'n*, the restraint in this case goes well beyond commentary concerning the specific facts or parties to the litigation. Instead, it unconstitutionally sweeps within its reach *any* comment that Petitioner might wish to make through its advocacy advertising concerning many of the controversial general issues that arise out of the asbestos litigation debate. The injunction thus effectively precludes

Petitioner from contributing to the debate on matters that are of enormous political concern to the electorate.[2]

Also of great importance is the fact that Respondent imposed the restraint without making a finding of fact that Petitioner's advertising presented the "serious and imminent threat" that the First Amendment requires be shown before restraint may be imposed. Indeed, Respondent failed even to make a factual inquiry into this question prior to issuing the injunction. Absent such an inquiry, Respondent had absolutely no basis on which to assume that admonitions given to the jurors not to read or see anything about asbestos would be ignored. Thus, we have a situation in which a prior restraint was imposed on political expression, without even the slightest inquiry whether that expression presented a truly imminent threat of serious harm. It is difficult to imagine a more glaring violation of fundamental constitutional rights that inhere in the American political process.

II.

THE LOWER COURT'S DECISION UPHOLDING RESPONDENT'S INJUNCTION GIVES RISE TO SUBSTANTIAL UNCERTAINTY BECAUSE IT DIRECTLY CONTRADICTS A RECENT DECISION OF THE MARYLAND COURT OF SPECIAL APPEALS

The lower court's decision upholding Respondent's injunction stands in direct contrast to the recent decision of the Maryland Court of Special Appeals in the case of

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[2] As Petitioner's previously published advocacy advertisements (set forth in the Appendix at pp. 41-53) make clear, if Petitioner had been permitted to advertise during the trials before Respondent, Petitioner's comments would have been directed to the general issues surrounding asbestos litigation, not to specific facts or questions directly involved in the pending trials.

Keene Corp. v. Abate, ____ Md. App. ____ (July 1, 1992).[3] In that decision, the appellate court vacated an injunction issued by a trial judge in Baltimore, Maryland, prohibiting Petitioner from advertising about asbestos or asbestos litigation during the pendency of a trial. That injunction, which had been expressly modeled on Respondent's initial order, was similar to Respondent's injunction in all meaningful respects.[4] When the Maryland Court of Special Appeals was presented with a First Amendment challenge to the Baltimore trial court's injunction, it immediately vacated the trial court's order. Petitioner is left, then, with decisions of the appellate courts of two states reaching diametrically opposite conclusions as to the constitutionality of similar injunctions issued against it for the very same speech. In Maryland, this speech is constitutionally protected. In Texas, under current standards, it is not. Unless this Court grants certiorari, this significant uncertainty in the status of the First Amendment rights of civil litigants will remain in existence indefinitely.[5]

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[3] A copy of the opinion of the Maryland Court of Special Appeals in *Keene Corp. v. Abate* appears in the Appendix, at pp. 70-81.

[4] It is true that the order in *Abate* prohibited "advertising regarding asbestos and/or asbestos litigation" in general, while Respondent's order below ultimately prohibited only advertising "regarding punitive damages and attorneys' fees in reference to asbestos litigation." However, the two are identical for purposes of First Amendment analysis, since reform of the award of punitive damages and the method for determining attorneys' fees constitute important elements of the current political debate about the need for asbestos litigation reform.

[5] The opinion of the Texas Court of Appeals below was summary and unpublished. However, it is the very existence of Respondent's injunction that gives rise to uncertainty and unpredictability. If that injunction is allowed to stand, counsel for asbestos plaintiffs throughout the nation will undoubtedly seek to rely on it in other

(Footnote continued on following page)

III.

RESPONDENT'S INJUNCTION IS INCONSISTENT WITH NUMEROUS STATE AND FEDERAL DECISIONS INVOLVING SIMILAR FACT SITUATIONS

Numerous state and federal decisions have found that injunctions in a civil case preventing a litigant from commenting on the general political or social issues implicated in the litigation unconstitutionally infringe free speech rights. For example, in *Quinn v. Aetna Life & Cas. Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd per curiam*, 616 F.2d 38 (2d Cir. 1980), plaintiffs in state court personal injury actions brought against Aetna sought to enjoin Aetna's further publication of two advocacy advertisements. "The thrust of both advertisements [was] that the current system for handling tort claims results in excessive jury awards which increase insurance rates." 482 F. Supp. at 25. The injunction was sought on the grounds that the advertisements allegedly were "part of 'a program calculated to tamper with juries in their deliberative process.' " *Id.* In refusing to issue the injunction, the District Court noted that "[i]n all reported cases plaintiffs have been unsuccessful in seeking an injunction against advertisements such as those in the present case . . ." *Id.* at 27. The Court concluded "that the advertisements here sought to be enjoined are entitled to First Amendment protection and could not be restrained even

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[5] *continued*

jurisdictions. Indeed, Respondent's initial order served as the basis for the injunction issued against Petitioner by the trial judge in Baltimore, vacated by the Maryland Court of Special Appeals in *Abate*. Moreover, the existence of Respondent's injunction was heavily relied upon as precedent on appeal by counsel for plaintiffs in *Abate*. The Court of Special Appeals in *Abate* made particular reference to the existence of the Texas injunction. Appendix, at p. 72.

if a valid cause of action exists. Because they are protected, plaintiffs have no cause of action in equity and the complaint must be dismissed." *Id.* at 29.

In affirming, the United States Court of Appeals for the Second Circuit stated: "We affirm the resolution of the First Amendment claim substantially for the reasons set forth in [the District Court's] thorough and considered opinion . . ." 616 F.2d at 40. To a similar effect, see *Rutledge v. The Liability Ins. Industry*, 487 F. Supp. 5 (W.D. La. 1979).

State courts considering similar questions have also found such injunctions to violate the First Amendment. In *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986), the Illinois Supreme Court found that a lower court's gag order preventing a corporate defendant from communicating with the media concerning the litigation constituted a First Amendment violation. The Illinois Supreme Court could "find no substantial evidence to justify the circuit court's conclusion that a 'serious and imminent threat to the fair administration of justice' existed because of Monsanto's communication with the media regarding the present case." *Id.* 112 Ill. 2d at 245, 492 N.E.2d at 1337. *See also NYPIRG v. Insurance Information Institute*, 140 Misc. 2d 920, 531 N.Y.S.2d 1002 (Sup. Ct. 1988).

Courts have been especially hesitant to regulate a litigant's expression that does not concern the specific facts of the trial. *See Ruggieri v. Johns-Manville Prods. Corp.*, 503 F. Supp. 1036, 1040 (D.R.I. 1980) (emphasis added): "[T]he only comment that can be proscribed, when no other protective alternative exists, is *that which in some meaningful way is targeted to the case to be tried* and which poses a 'serious and imminent threat' to that trial." *See also State v. Cottman Transmission Systems, Inc.*,

75 Md. App. 647, 542 A.2d 859, 865 (Spec. App. 1988) (limiting gag order "so as to proscribe any comments relative to the merits of the case.")

Standing apart from all these decisions is the injunction issued by Respondent and upheld by the Texas appellate court. As in those cases, the present case involves an attempt to enjoin a litigant's expression on general issues of great political interest that happens to occur during a pending civil litigation. Unlike all of the other decisions, the lower courts in the present case completely ignored the severe threat to free speech interests and authorized the stifling of Petitioner's First Amendment rights by means of a prior restraint. Hence, if the lower courts' decisions are allowed to stand, they will introduce into the law a line of precedent, undermining the constitutional right of free expression, that is diametrically opposed to previously well-established state and federal doctrine.

In sum, both Respondent's injunction and the Texas appellate court's decision summarily upholding it stand in stark contrast to decisions of this Court, as well as decisions of other state and federal courts, recognizing the need to protect the constitutional rights of litigants to comment on matters of public importance. Moreover, the inconsistency between the lower court decision in the present case and the contemporaneous decision of the Maryland Court of Special Appeals in *Keene Corp. v. Abate* can only give rise to chilling and debilitating uncertainty and unpredictability in the protection given to the free speech rights of litigants in civil trials.

For all of these reasons, Petitioner respectfully urges this Court to grant Petitioner's request for a writ of certiorari in the present case.

IV.

THIS COURT HAS JURISDICTION TO HEAR THIS CASE

A. This Case Is Not Moot Because Under Federal Law This Matter Is Capable Of Repetition Yet Will Always Evade Review

It is doubtless true that this Court requires a case or controversy in order to invoke its jurisdiction. U.S. Const., Art. III, §2. In this case, the underlying order issued by Respondent terminated on its own terms at the end of trial. This fact would normally prevent a judicial determination by this Court. However, this exact situation is very likely to recur the next time Petitioner has a products liability trial. Petitioner's speech rights will be abridged again, without Petitioner ever being provided the opportunity to vindicate its rights in this Court, due to the inherently short-lived nature of the order.

Under federal law, this case clearly falls within the "capable-of-repetition-yet-evading-review" exception to normal principles of mootness. This Court has jurisdiction if there is a "reasonable likelihood" or a "demonstrated probability" that Petitioner will again suffer the deprivation of constitutional rights that gave rise to this suit, and the challenged action in its duration will be too short to be fully litigated prior to its cessation or expiration. *Honig v. Doe*, 484 U.S. 305, 318, 323 (1988); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*).

This case easily meets the requirements for the "capable-of-repetition-yet-evading-review" exception. First, Petitioner has been and continues to be involved in a nationwide publicity campaign in the mass media involving important political issues, including the excessive cost of our legal system, and the propriety and efficacy of punitive damages, particularly in the context of asbestos litigation.

Moreover, Petitioner continues to be involved as a defendant in thousands of lawsuits in the Texas courts. There is every reason to believe that this stream of cases will continue for the foreseeable future. Therefore, there is at the very least a "reasonable likelihood," if not a virtual certainty, that Petitioner will again be placed in a position where it will seek to publish a political advocacy advertisement while it is a civil defendant in the Texas courts.

Just as likely is the probability that Petitioner will be enjoined by the Texas courts from advertising during the pendency of those trials. Counsel for plaintiffs in the underlying litigation continues to represent thousands of other asbestos plaintiffs in the Texas courts, and there is every reason to believe that similar injunctions will be sought in all future cases. To date, the state courts of Texas have shown that when such injunctive relief is requested, it will be granted, as Respondent's decision here demonstrates. Indeed, another Texas trial judge recently held Petitioner in contempt for publishing an advocacy advertisement during a trial, even though no order had been violated by such publication. *Orsak v. Keene Corp.*, order of Hon. Sharolyn Wood, District Court of Harris County, Texas, 127th Judicial District, June 1, 1992.

Any such future order will be effectively insulated from review in this Court in exactly the same manner that this order was. The normal trial of an asbestos products liability case takes from two to six weeks. There is no way that Petitioner can appeal through the Texas court system, let alone apply for and obtain a writ of certiorari from this Court, before the end of a trial in a Texas court. Therefore, any such order is inherently too short in its duration to be fully litigated prior to its expiration.

There is, then, a strong likelihood that Petitioner will once again be subjected to a Texas judge's injunction prohibiting its protected speech activities, and that any future attempt to litigate that order will, as here, be deemed moot because of the expiration of the underlying order. This case is virtually identical on this point to this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). There, this Court granted review, even though the case was technically over, because the issue was one capable of repetition yet evading review. This Court reasoned that

> if [the criminal defendant's] conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [the criminal defendant's] retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners . . . is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, *since these orders are by nature short-lived*. 427 U.S. at 546-47 (emphasis added).

The likelihood of repetition of the challenged conduct in this case is considerably stronger than in several decisions in which this Court invoked the capable-of-repetition-yet-evading-review exception. *See, e.g., Honig v. Doe*, 484 U.S. 305 (1988) (likelihood that twenty-year-old emotionally handicapped individual who was no longer resident of school district that had suspended him and who had no plans to return to school in foreseeable future would return to school and be illegally disciplined); *Roe v. Wade*, 410 U.S. 113 (1973) (likelihood that litigant would once again become pregnant).

There will be no better opportunity to protect Petitioner's constitutional rights in the future. Therefore, this Court should apply the capable-of-repetition-yet-evading-review exception and hear Petitioner's First Amendment challenge.

B. The Decision By The Texas Supreme Court That This Case Is Moot Is Not An Independent And Adequate State Ground Preventing Review In This Court

The Texas Supreme Court, without opinion, dismissed as moot Petitioner's appeal from the appellate court's denial of its writ of mandamus. On motion for rehearing, that Court continued to adhere to its position, though Petitioner had demonstrated beyond question that Texas case law unambiguously recognizes an exception to the mootness doctrine for constitutional cases capable of repetition yet evading review. The decisions of the Texas Supreme Court should not be deemed to stand on an independent and adequate state ground which would preclude review in this Court.

It is a familiar constitutional principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. However, the justification for this deference to state courts has reduced application where the state ground relied upon is purely procedural. *Henry v. Mississippi*, 379 U.S. 443, 446-47 (1965); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

A state court's refusal on the grounds of mootness to consider a federal claim does not preclude this Court's independent determination of the question of mootness. That issue is itself a question of federal law, which this

Court must ultimately decide. *Henry v. Mississippi*, 379 U.S. at 447; *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

In *Liner*, a Tennessee state trial judge had enjoined a labor union's picketing at a construction site. The union argued that the state courts had no jurisdiction to issue an injunction because, under federal law, the labor dispute was within the exclusive domain of the National Labor Relations Board. The trial court refused to dissolve the injunction, finding there was no "bona fide" labor dispute between the parties and therefore it had jurisdiction. 375 U.S. at 303. On appeal, the Court of Appeals of Tennessee found that the construction on the site had been completed, and therefore, "this case had become moot." *Id.* at 303-304. Nevertheless it affirmed the trial judge's finding that a bona fide labor dispute did not exist. *Id.* After the Supreme Court of Tennessee denied certiorari, this Court took the case.

In discussing respondent's challenge to this Court's jurisdiction because of mootness, this Court stated:

> The argument is that we are bound by the state appellate court's holding that this case was rendered moot by the completion of construction. We think, however, that in this case the question of mootness is itself a question of federal law upon which we must pronounce final judgment.

Liner v. Jafco, Inc., 375 U.S. at 304.

Similarly here, this Court is not bound by the Texas Supreme Court's pronouncement that the matter is moot. Instead, this Court must perform its own independent mootness analysis under federal law. As already demonstrated (*See* discussion *supra* at pp. 14-16), such an analysis clearly reveals that the case falls within the established exception to mootness for issues that are capable of repetition yet will evade review.

Even if one proceeds on the assumption that the issue of mootness at the state court level is purely a matter of state law, under well established decisions of this Court the Texas Supreme Court's findings of mootness in this case cannot serve as an independent and adequate state ground, barring review. This Court has long held that a state court's application of its own procedural rules to bar determination of a federal issue will not prevent review in this Court, if the state court has misapplied its own procedural law. As this Court held in *Ward v. Love County*, 253 U.S. 17, 22 (1920), "[i]t . . . is within our province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. . . ."

This Court's decision in *Rogers v. Alabama*, 192 U.S. 226 (1904), is directly in point. There the defendant had moved to quash a murder indictment on the grounds that African-Americans had been systemically excluded from the grand jury. However, the Alabama Supreme Court refused to consider the motion on grounds that it was "prolix." Justice Holmes, speaking for this Court, reversed, noting that the motion consumed only two pages in the printed record. While Justice Holmes did not deny that prolixity might, in the abstract, serve as an independent and adequate procedural state ground, he refused to accept without question the state court's decision that that procedural barrier was applicable. Also controlling is *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There, the Alabama Supreme Court had held that failure to comply with a state procedural rule barred the NAACP from raising its constitutional challenge. This Court responded: "Paying full respect to the state court's

opinion, it seems to us crystal clear that the rule invoked by it cannot reasonably be deemed applicable to this case." 377 U.S. at 296.

Similarly, in this case it may be perfectly appropriate, in the abstract, for the Texas Supreme Court to refuse to adjudicate issues of federal law on mootness grounds. However, the Texas Supreme Court may not misapply that state law ground in order to bar review in this Court. It is, then, both necessary and appropriate in this case for this Court to inquire into whether the Texas Supreme Court accurately applied its own procedural rules in refusing to adjudicate Petitioner's federal constitutional challenge. Such an examination reveals unambiguously that that court failed properly to apply its own exception to the mootness doctrine for cases that are capable of repetition yet will evade review, despite Petitioner's argument, on its motion for rehearing, that this exception controlled.

Under Texas law, it is well established that a case is not considered moot if the situation is capable of repetition yet will evade review. This exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot. *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). Under Texas law, this exception is applied when—as in this case—a party seeks to challenge allegedly unconstitutional acts performed by the government. *See State v. Lodge*, 608 S.W.2d 910 (Tex. 1980) (challenging unconstitutional mental commitment by state); *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981) (challenging prior restraints on free speech by city).

Under prior Texas precedent this case presents the perfect instance for application of the capable-of-repetition-yet-evading-review exception. As noted *supra* at pp. 14-16,

Petitioner has been engaging in a nationwide pattern of advocacy and publication regarding the need for reform of the legal system, including the excessive and repetitive award of punitive damages and excessive legal fees. Petitioner has every intention of continuing this program, throughout the nation. Moreover, Petitioner is currently involved in thousands of lawsuits in Texas, with additional suits being filed constantly, making it a virtual certainty that in a different trial, a trial judge of the State of Texas will enjoin Petitioner's publication of advertisements during the pendency of one of these numerous trials. In addition, "[b]ecause temporary orders imposing prior restraints upon free speech are by nature short-lived," this case falls within Texas' application of the exception for cases that are capable of repetition yet evading review. *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d at 209 (Tex. 1981). The Texas Supreme Court clearly has misapplied Texas mootness law by finding this case to be moot. As a result, there is no jurisdictional bar to this Court's granting certiorari.

CONCLUSION

This case presents an issue of federal constitutional policy of tremendous importance: The impact of a prior restraint on a litigant's constitutional right to comment on political issues during the pendency of the trial. Both Respondent's order and the Texas appellate court's decision upholding it clearly depart from decisions of this Court, as well as of numerous state and federal courts, in unconstitutionally stifling Petitioner's free speech right. Moreover, unless this Court agrees to review Respondent's injunction, significant unpredictability in First Amendment interpretation will result, because of the dramatic differences between the decisions of the Texas courts and the opinion of the Maryland appellate court on the exact same issue.

If the state supreme court is permitted to misapply the state's own exception for cases capable of repetition yet evading review, it will be able effectively to insulate for all time this significant constitutional violation from this Court's review. Both the constitutional rights of free expression and this Court's primacy within the federal system will be severely undermined as a result. For these reasons, this Court should find that no independent and adequate state ground supports the Texas Supreme Court's refusal to consider Petitioner's First Amendment challenge, and grant the petition for a writ of certiorari.

Respectfully submitted,

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